



NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

JOSE SANTIAGO vs. METHUEN POLICE DEPARTMENT & others. [FN1]

09-P-1228

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Jose Santiago, appeals from a Superior Court decision in favor of the defendants on the parties' cross motions for judgment on the pleadings, which affirmed the decision of the Civil Service Commission (commission). The commission had affirmed the appointing authority's termination of the plaintiff as a police officer for his failure to comply with a retraining requirement. [FN2]

Background. The plaintiff was first appointed to the Methuen police department (department) as a police officer in 1982 and later was promoted to sergeant, where he worked until 1997 when he was injured. [FN3] Santiago does not contest that he has had a five-year break in service, as he has not been on duty since November 11, 1997. [FN4] He was elected to the office of State representative in 1998, reelected in 2000, and received a leave of absence from his position as a Methuen police sergeant.

In January, 2003, after having failed to be reelected as State representative, the plaintiff sought to withdraw his leave of absence and be reinstated, requesting a return to light duty. [FN5] The police chief responded that, because the plaintiff had an interruption of service of more than five years, pursuant to 550 Code Mass. Regs. § 3.03(6)(c) (1993), he was required to complete a retraining program at a police academy at his own expense and without pay, but with the sponsorship of the department. [FN6] The plaintiff refused to attend the academy retraining program under these conditions, insisting he had a right to immediate reinstatement with pay and without having to incur the expense of the retraining program. The police chief continued to communicate to him that he was required to complete the retraining prior to reinstatement, including mailing the police academy application packet to the plaintiff's home. The plaintiff responded that he was ready to return to active duty immediately and would attend any reasonable retraining program at the town of Methuen's (town) expense. He had not undergone the retraining as was required and, in March, 2004, Santiago demanded a hearing under the provisions of G. L. c. 31, § 37.

By June, 2004, without having received any further response from the plaintiff, the police chief withdrew the department's academy sponsorship and the mayor of the town terminated the plaintiff's employment on June 27, 2004.

Discussion. In reviewing a statutory interpretation by the commission, 'we must apply all rational presumptions in favor of the validity of the administrative action and not declare it void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate.' *Massachusetts Fedn. of Teachers, AFT, AFL-CIO v. Board of Educ.*, 436 Mass. 763, 771 (2002), quoting from *Consolidated Cigar Corp. v. Department of Pub. Health*, 372 Mass. 844, 855 (1977). Such a regulation will be declared void only if there is an 'absence of any conceivable grounds upon which [the rule] may be upheld.' *Massachusetts Fedn. of Teachers, AFT, AFL-CIO v. Board of Educ.*, *supra*, quoting from *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 776 (1980). 'We only disturb an agency's interpretation of its own regulation if the interpretation is patently wrong, unreasonable, arbitrary, whimsical, or capricious.' *TBI, Inc. v. Board of Health of N. Andover*, 431 Mass. 9, 17 (2000), quoting from *Brookline v. Commissioner of the Dept. of Envtl. Quality Engr.*, 398 Mass. 404, 414 (1986).

The plaintiff makes two arguments on appeal, neither of which are persuasive here. [FN7] First, he contends that, according to G. L. c. 31, § 39, he remained a vested police sergeant while on leave as a State

representative and, as such, he could not suffer any loss of right under the civil service laws. He argues that this includes the right to being paid during retraining and have the retraining paid for in accordance with c. 41, § 96B. This argument is unavailing; by its terms, and as conceded by the plaintiff, G. L. c. 41, § 96B, applies only to active duty officers. Moreover, he has not lost any rights that any other police officer would not have lost if he had a five-year break in service, whether that break was necessitated by a leave, retirement, or disability.

Second, the plaintiff does not contest that he is subject to a retraining requirement, instead, he contends that the police department should pay his retraining expenses and wages, pursuant to G. L. c. 31, § 37, [FN8] read together with c. 41, § 96B, [FN9] and 550 Code Mass. Regs. § 3.03. However, these provisions read as a cohesive whole do not require the department to pay for his training and wages.

The town's position, with which the commission agreed, is that according to G. L. c. 41, § 96B, a municipality will pay for the training expenses and salary of an officer in only two situations: (1) new appointees to a full-time position in a police department, and, (2) in-service or supervisory training. Neither of those situations applies to this plaintiff. There is no statutory provision concerning the expense of the retraining requirement for an officer who has been on a leave of absence for more than five years. [FN10]

The town and the commission relied on *Sullivan v. Brookline*, 435 Mass. 353 (2001), to support the proposition that the plaintiff needed to be retrained. *Sullivan* involved a formerly tenured police officer who sought reinstatement after being retired on a disability pension under the provisions of G. L. c. 31, § 39. While the plaintiff does not dispute the need to be retrained, he argues that *Sullivan* required the department to pay the expenses of retraining and his wages. However, *Sullivan* allocated the financial burden of retraining on the officer and not on the police department. *Id.* at 362. 'Allowing retirees to return to the job prior to any retraining would return to the payroll of a police department, with full pay and benefits, officers who could not perform the complete range of duties An officer eligible for reinstatement remains on his or her retirement income during retraining rather than prematurely resuming full pay and benefits, just as a formerly disabled officer remains on his or her retirement income until a vacancy exists. Additionally, if former retirees fail to complete retraining satisfactorily, they are simply not reinstated and the municipality does not have to navigate the civil service laws to dismiss them.' *Id.* at 361-362.

The reasoning in *Sullivan* bears logical application to the case at bar; it is a valid concern that a municipality will likewise have to shoulder the financial burden of an officer's wages and the cost of retraining. The municipality should not be required to duplicate the expense that it had borne once before when that officer was newly appointed, for no reason other than his voluntary choice to take a leave of absence for reasons not related to the police service from which he sought to become inactive. Moreover, as the commission noted, the municipality may also be exposed to greater liability for benefits to the applicant due to injury during retraining. '[R]equired retraining ensures that former retirees are fully prepared to perform the duties imposed by their positions, reducing the risk of reinjury and liability to third parties.' *Id.* at 362.

In upholding the plaintiff's termination for failing to attend training, the commission determined that the position of the municipality regarding this financial burden was justified. The municipality relied upon the absence of language in G. L. c. 41, § 96B, or any other statute, that requires the department to pay wages and training costs in the situation presented here that involves the retraining of a police officer after a

five-year break in service due to a voluntary leave of absence.

We cannot say that the decision of the commission was legally untenable. Indeed, to do so would be to require the commission to assume an element that neither the statute nor the regulations provide, namely, that the municipality is obligated to pay wages and the costs of retraining under the circumstances of this case. More importantly, the commission has chosen between two conflicting, but perhaps equally justifiable, views for which neither the Superior Court, nor this court may substitute our judgment. We also cannot say that the commission's judgment is 'wholly lacking in evidentiary support or . . . tainted by errors of law,' *Woolfall's Case*, 13 Mass. App. Ct. 1070, 1070 (1982), that its administrative interpretation is not 'in harmony with the legislative mandate,' *Massachusetts Fedn. of Teachers, AFT, AFL-CIO v. Board of Educ.*, 436 Mass. at 771, is devoid 'of any conceivable grounds upon which [its decision] may be upheld,' *ibid.*, or is 'patently wrong, unreasonable, arbitrary, whimsical, or capricious,' *TBI, Inc. v. Board of Health of N. Andover*, 431 Mass. at 17. Consequently, the decision of the Superior Court, upholding the decision of the commission, must be affirmed.

Judgment affirmed.

By the Court (Trainor, Rubin & Fecteau, JJ.),

Entered: August 17, 2010.

FN1. City of Methuen, and Commissioner of the Civil Service Commission.

FN2. The motion judge does not appear to have stated any reasons in support of her order allowing the defendants' motion for judgment on the pleadings; in any case, we must determine whether the decision of the commission is based upon substantial evidence and is otherwise legally tenable.

FN3. He was ordered to return to duty on October 12, 1997; he returned to duty for five days and then used accumulated sick and vacation days.

FN4. Subsequent unrelated activity includes the denial of his request for accidental disability retirement on November 8, 1999.

FN5. In March, 2002, while still a State representative, the plaintiff had requested a return to work for light duty, indicating that he had a right to pick a shift that did not conflict with his duties as a representative. The police chief responded that he was unaware of any provision that permitted him to pick his shift and denied this request, from which no further action occurred.

FN6. Section 3.03(6) of 550 Code Mass. Regs. states, in relevant part, that 'any full-time municipal police officer who has undergone an interruption in police service shall conform to the following standards prior to exercising police powers: . . . (c) Interruptions of Five or More Years. Successfully complete an additional [c]ouncil-approved basic recruit academy subject to department sponsorship and compliance with admission requirements.'

FN7. The plaintiff makes other arguments: forcing him to attend training without pay violates wage laws, failure to give statutory notice of termination within fourteen days of a failure to report, he was terminated without just cause and did not receive appropriate written notice, and that he should have been temporarily, conditionally reinstated pending completion of the training program. It appears that these issues were not raised below; when the plaintiff attempted to raise them in his postdecision motion to reconsider, those issues were struck on the defendants' motion.

FN8. Section 37 provides, in pertinent part: 'Any person elected to a state office . . . who is a permanent employee in a civil service position . . . shall, upon his written request made to the appointing authority, be granted a leave of absence without pay from his civil service position . . . and shall not, as a result of such election, be suspended or discharged or suffer any loss of rights under the civil service law and rules.

'Any person who has been granted a leave of absence or an extension thereof pursuant to this section shall be reinstated at the end of the period for which the leave was granted and may be reinstated earlier. If the appointing authority, upon demand of such person, shall fail to reinstate him to his civil service position, such person may request a hearing before the administrator.

'If a person shall fail to return to his civil service position at or before completion of the period for which a leave of absence has been granted under any provision of this section, the appointing authority shall, within fourteen days after the completion of such period, give such person a written notice setting forth the pertinent facts of the case and informing him that his employment in such position is considered to be terminated, whereupon the employment of such person in such position shall terminate. . . . The provision of sections forty-one through forty-five shall not apply to a termination made under this paragraph.'

FN9. General Laws c. 41, § 96B, as amended by St. 2002, c. 196, § 18, provides in material part: 'Every person who receives an appointment to a position on a full-time basis in which he will exercise police powers in the police department of any city or town, shall prior to exercising police powers, be assigned to and satisfactorily complete a prescribed course of study approved by the municipal police training committee. The provisions of chapter thirty-one [dealing with civil service] and any collective bargaining agreement notwithstanding, any person so attending such a school shall be deemed to be a student officer and shall be exempted from the provisions of chapter thirty-one and any collective bargaining agreement for that period during which he is assigned to a municipal police training school, provided that such person shall be paid the regular wages provided for the position to which he was appointed and such reasonable expenses as may be determined by the appointing authority and be subject to the provisions of chapter one hundred and fifty-two [worker's compensation].'

FN10. To justify its interpretation placing the financial burden upon the applicant, the commission relies upon an opinion letter of the Attorney General, interpreting an earlier version of the statute, and upon general principles of statutory construction providing that an omission from a statute cannot be supplied by courts. Op. Atty. Gen., No. 30 (June 16, 1978). This opinion specifically concerned the rule making authority of the Criminal Justice Training Council; it sought to impose a rule requiring the payment of wages, under the provisions of G. L. c. 41, § 96B, par. 6, governing the training of persons other than police officers, upon agencies that sought its training services in circumstances other than those described in the first two paragraphs of G. L. c. 41, § 96B. While the present case does not involve a newly appointed police officer, it involves a police officer nonetheless.